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No. 483

Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NATIONAL SURETY CORPORATION and
UNION TRUST COMPANY,
ST. PETERSBURG, FLORIDA,

Petitioners,

-vs-

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
LLEWELLYN MACHINERY COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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leave to file this Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit.

The Petitioners, National Surety Corporation and Union Trust Company pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 29, 1959, reversing, with a dissenting opinion, the Judgment of the United States District Court for the Southern District of Florida, Miami Division, which dismissed the Complaint filed by the United States for the use of Llewellyn Machinery Corp. Petition for Rehearing was timely filed in the United States Court of Appeals and was denied by order of said Court entered July 29, 1959.

CITATIONS TO OPINIONS FROM THE COURTS BELOW

The unreported order of the United States District Court for the Southern District of Florida, Miami Division, dismissing the Complaint appears on pages 50 and 51 of the Record printed for the use of the United States Court of Appeals below and filed with this petition pursuant to Rule. The opinion of the Court of Appeals for the Fifth Circuit reversing the said Order of the District Court appears on pages 58-64 of the said printed record and is reported in **268 F. 2d 610.** The unreported judgment of the Court of Appeals appears in the said printed record at page 65. The unreported order of the said Court of Appeals, denying the Petition for Rehearing appears in said printed record on Page 72.

GROUNDS ON WHICH THE JUDISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

The jurisdiction of the United States Supreme Court is invoked on the ground that the United States Court of Appeals, Fifth Circuit, has rendered a decision in conflict with one of its previous decisions without impliedly or expressly overruling or reversing the previous decision.

For an additional ground petitioners state that the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but should be, settled by the United States Supreme Court.

The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with one of its previous decisions on the same matter and on an important Federal Question, arising under a Federal statute and which will restrict the writing of Surety Bonds under the Miller Act by every bonding company in the United States. The law established by the said subsequent and conflicting opinion will result in impossible compliance with the bond provisions of the Miller Act for the reason that the bonding companies will not become sureties on such bonds where exposure is unlimited and they are by law made insurers of all risks, the provisions of the bond and the act to the contrary notwithstanding. (R-63).

(i) The date of the Judgment sought to be reviewed is June 29, 1959 and its entry was on June 29, 1959 (R-65).

(ii) The order denying Petition for Rehearing was entered on July 29, 1959 (R-72).

(iii) The Supreme Court has jurisdiction to review the said judgment and opinion under 28 USCA, §1651 (a) and 28 USCA, §1254 (1).

QUESTION PRESENTED

DOES A BOND SUPPLIED PURSUANT TO THE PROVISIONS OF THE MILLER ACT AND WRITTEN PURSUANT TO THE DIRECTIVES OF THAT ACT AND NOT AS A RESULT OF ARMS LENGTH DEALING BETWEEN PARTIES COVER THE ORIGINAL PURCHASE PRICE FOR OR REPLACEMENT VALUE OF EQUIPMENT?

FEDERAL STATUTE INVOLVED

The Federal Statute involved is the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. 270 a-d (1952).

"§270a **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sure-

ties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000, the said payment bond shall be in the sum of $2,500,000.

* * *"

"270b. **Same; rights of persons furnishing labor or material.**

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the

labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: PROVIDED, HOWEVER, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and in the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which

the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, §2, 49 Stat. 794."

CONCISE STATEMENT OF THE CASE

On or about July 22, 1955, the United States of America entered into a written contract with Thomson Contracting Company, Inc., for the construction of Mooring Dolphins at the Joint Long Range Proving Grounds, British West Indies (R. 14, 15). The consideration to be paid the contractor was $143,000. In accordance with the provisions of 40 USC, §270a, Thomson Contracting Company, Inc., as principal, and National Surety Corporation, as surety, executed and delivered to the United States their payment bond (R. 16-19). Thereafter, the said contractor rented equipment from Llewellyn Machinery Company. While the equipment was in transit to the job site in the Caribbean Sea the vessel upon which it was being transported sank and the equipment was lost. After the execution of the said contract by Thomson and the United States Government dated July 22, 1955, and the execution of the surety bond as aforesaid and the loss of the machinery by sinking, the Llewellyn Machinery Company and the said contractor agreed that the value of the machinery was $17,400 (R. 17).

After all of the foregoing, and on May 7, 1956, when the rented equipment had already been lost at sea, the

contractor executed and entered into an arrangement, other than a rental contract, with Llewellyn Machinery Company. Under the new arrangement, the contractor Thomson, being in need of the type of equipment that was lost and being without funds with which to purchase it, the said Llewellyn Machinery Company supplied the money for the purchase and delivery of the equipment and in turn took back from it, the contractor, a note, which was later discounted to put Llewellyn back in funds which had been disbursed in the purchase of the replacement equipment. As security for payment of the note Llewellyn then took a Retain Title Contract from Thomson, covering the replacement machinery (R. 47-49). One Thousand Dollars was paid to Llewellyn by Thomson at or about the date of the execution of the note and contract on May 7, 1956. Of the $17,400 value agreed upon between Thomson and Llewellyn after the sinking of the machinery, $16,400 remained unpaid at the time of the institution of the subject litigation (R. 47-49).

The Respondent, in its attempt to state a cause of action in the Federal District Court for the Southern District of Florida, Miami Division, filed on August 12, 1958, and came to rest upon, its Second Amended Complaint (R. 26-30). By that date, Third Party Proceedings had been instituted by the original defendant, National Surety Corporation, and in which Union Trust Company of St. Petersburg, Florida, had been brought into the proceeding as Third Party Defendant. To the Second Amended Complaint, and on August 20, 1958, the Third Party Defendant filed answer and defenses (R. 31-33). To the Second Amended Complaint the original defendant, National Surety Corporation, on September 18, 1958, filed its answer (R. 35-41).

The original defendant and the Third Party Defendant filed motions for summary judgment on September 22, 1958 and October 1, 1958, respectively (R. 42-43) and Motions for Judgment on the Pleadings on September 22, 1958 and August 20, 1958, respectively (R. 41 and 34).

On December 5, 1958, an order was signed by the Honorable Emett C. Choate, United States District Judge in the District Court of the United States for the Southern District of Florida, Miami Division, and was entered December 5, 1958, granting the said Motions for Judgment on the Pleadings and respondent's cause of action was dismissed at its cost for the reason that the said District Judge was of the opinion that the loss did not come within the purview of the Miller Act and the National Surety Corporation surety bond filed in conformity with the act (R. 50-51).

On December 31, 1958 the Respondent filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, appealing from the said order of dismissal entered December 5, 1958 (R. 51-52). On the appeal pursuant to the aforesaid notice, the Order of December 5, 1958 was reversed by Judgment and Opinion of the United States Court of Appeals, Fifth Circuit, from which there was a dissent, with directions for further proceedings in the lower court not inconsistent with the said Opinion (R. 58-64).

The basis for Federal jurisdiction in the Court of First instance was a provision of the Miller Act, 49 Stat. 794, 40 USCA 270b (b).

ARGUMENT

The Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but should be settled by this Court. That Court has decided that replacement value of equipment and machinery leased for use upon a public project is recoverable under a surety bond posted pursuant to the requirements of the Miller Act. The strongest reason that can be offered for this Court to settle that particular question is that the Court of Appeals for the Fifth Circuit in its opinion in **Massachusetts Bonding and Ins. Co. v. U. S.**, 88 F. 2d 388, 390, March 1937, specifically and emphatically held that the original purchase price for equipment, which in this case is the equivalent of replacement value, was not covered by a surety bond posted under the Miller Act. By the majority opinion in the instant case that Court has created such a conflict that the law on this subject is now totally upset, disturbed and in a state of conflict. This does not result from conflicting opinions in different circuits but from a conflicting opinion within the same circuit wherein the Court did not reverse or specifically overrule its 1937 opinion in the **Massachusetts Bonding and Ins. Co.** case, supra. This predicament is especially regrettable in view of the fact that one member of the Court of Appeals for the Fifth Circuit stated in his strong dissenting opinion in the instant case that the **Massachusetts Bonding** case was one wherein a well reasoned opinion had been written and the case had perhaps become the leading case in the field.

It is made clear in Judge Hutcheson's dissenting opinion (R. 62-64) that this conflict of opinions within the Fifth Circuit results from a strained conclusion in the majority

opinion and from the over use of the cliche that liberal construction should be given to remedial statutes in order that appellate courts may depart from the judiciary field and invade the legislative fields. Judge Hutcheson, like most any member of the Bar, recognizes that the cliche has its place in jurisprudence.

The determination by the United States Supreme Court of the question involved in the instant case and as posed in this Petition is imperative because it involves a Federal Statute, the application of which is national in scope. The amount of money in this controversy is not the important factor to the petitioners, but the petitioner, National Surety Corporation, as well as every surety bonding company in the United States is entitled to judicial instruction as to the limit of its liability or exposure when called upon to post surety bonds pursuant to the Federal act here involved.

By its majority opinion in the instant case, the Fifth Circuit Court of Appeals, without judicial precedent or any basis known to the dissenter from that opinion or known in law generally, has now decided that when a surety bond is posted under the Miller Act, it becomes an all risk insurance policy and the surety on the bond becomes an all risk insurer without limitation as to types of claims recoverable. Such reasoning and interpretation goes way beyond liberal construction of remedial statutes.

On public works projects a surety bond is not supplied by a contractor because of the whim or desire of the United States. It results from a compulsory requirement flowing from a Federal law. The Miller Act requires that on such projects a performance and a payment bond must

be posted by the contractor, and upon which there shall be a surety. The payment bond is to make certain that those who supply labor and material to the contractor will be indemnified against loss to an extent. The bond is not posted as a result of any arms length dealing between parties as was suggested in the majority opinion in the instant case. You cannot exclude from coverage of the bond any obligation to pay for labor or material within the financial limits of the bond. There is no necessity to incorporate into such a bond provisions excluding matters other than labor and material for the reason that such matters do not come within the bond required. If the surety company in the instant case, as well as the sureties in any other case, could believe what it read from the opinion of the **Massachusetts Bonding and Ins. Co. v. U.S.** case, supra, then it would be entitled to believe that it was not necessary to incorporate any provisions within the surety bond which would exclude the liability for replacement cost of equipment. In that case, the Fifth Circuit said on page 390:

> "As to the 15 leased trucks, their original purchase price, being for equipment, was not covered by the bond * * * *"

Earlier and on page 389 of the **Massachusetts Bonding** opinion, the Fifth Circuit Court of Appeals stated:

> "The parties here concede on the one hand that the supplying by sale to the contractor of equipment which should last over several jobs is not covered by the bond, though rental of such is * * *"

From the authorities cited by the Court following the above quotation you can only conclude that the Fifth Circuit agreed with the understanding which counsel had reached in that case to the effect that equipment supplied to a contractor which would last over several jobs is not covered by a bond given on any particular job. It would seem to make little difference whether it was supplied by sale, rental or what have you; the point being that replacement value is not recoverable under the bond though rental of the equipment might be. The Court in the majority opinion in the instant case took some comfort from the pronouncement in **United States for the use of Norfolk So. Ry. v. Taylor,** 268 F. 635 (1920) Affirmed 4 Cir. 277 F. 945.

Judge Hutcheson dissented from that majority opinion, very correctly pointing out that the Norfolk case was not authority for the proposition that replacement value of equipment supplied upon a public project was recoverable under a Miller Act bond. It clearly appears from the Norfolk opinion, as pointed out by Judge Hutcheson, that the only proposition settled in that case was that rental and repair of equipment was covered by a Miller Act Bond.

CONCLUSION

No one would deny that the Miller Act or any other law should be construed, whether liberal or otherwise, in such a manner that the purposes for which the Act is enacted will be realized. A construction of the Miller Act on an unlimited liberal basis for the protection of materialmen and without any thought of protecting the contractor or surety would be half justice. The provision

of the Miller Act requiring a payment bond to protect laborers and materialmen is a good one and the terms and provisions of the Act should not be construed in such a way and on such a liberal basis that the surety bonding companies cannot be induced to join in such a bond. If the Act is construed in that manner and there is no limitation upon the type of claim covered by the Act or the bond and the bonding company's exposure to unlimited claims would make it an insurer of all risks then it is common, ordinary every day business sense that no bonding company would join without demanding prohibitive premiums and commerce would thereby be perilously affected. Certainly, Congress had no such intent when this Act was enacted though the Court of Appeals for the Fifth Circuit, in following the liberal construction of remedial statutes ascribes such intent to Congress. It is vigorously contended by Petitioners that the majority opinion of the Court of Appeals for the Fifth Circuit is erroneous, and lacks support in any prior judicial precedent.

It is respectfully submitted that this petition should be granted and the said majority opinion reversed and the Judgment of the United States District Court for the Southern District of Florida, Miami Division, reinstated.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned, WALTER HUMKEY, does hereby certify that a copy of said Petition for Certiorari was served by United States mail under Rule 33 of the Rules of the United States Supreme Court on the 6th day of October, 1959, by depositing a copy thereof in a United States Mail Box with first-class postage prepaid, addressed to WAKEFIELD AND UNDERWOOD, Ainsley Building, Miami 32, Florida, the counsel of record for the respondent.

WALTER HUMKEY